acts."[107] In addition, the Commission noted that its own review of the effect of newspaper ownership on television advertising rates "fail[ed] to show an effect on rates attributable to newspaper ownership."[108] Without any clear evidence of an existing or potential harm to competition, the FCC justified adoption of the rule primarily by reference to the FCC's policy of promoting ownership diversification. As the Supreme Court stated in affirming adoption of the rule:

> In the Commission's view, the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated. The prospective rules were justified, instead, by reference to the Commission's policy of promoting diversification of ownership: Increases in diversification of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing.'[109]

Since 1975, the FCC has had numerous occasions to consider competition in various markets for media advertising and has not uncovered any tangible economic harm from newspaper/broadcast cross-ownership. Indeed, these reviews have not revealed any reliable information supporting the theory that newspaper and broadcast advertising are reasonably interchangeable substitutes for one another, a necessary prerequisite for any conclusion that cross-ownership could damage competition.

The most direct inquiry into the effect of the rule on competition was made in the 1998 Biennial Regulatory Review. The comments supporting continuation of the rule did not empirically document any harm to competition that would result from its repeal, offering at most

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[107] *Second Report and Order*, 50 FCC Rcd at 1072.

[108] *Id.* at 1073.

[109] *NCCB*, 436 U.S. at 786 (citations omitted).

speculation based on descriptions of the marketplace.[110] Moreover, the Commission did not find any adverse effect on competition from co-ownership. In fact, the narrow concerns that the FCC expressed on the subject of competition were limited to positing whether the economic efficiencies of co-ownership could be equally well achieved through joint ventures or non-local co-ownership, concluding that the record was unclear as to whether the efficiencies of newspaper/broadcast combinations produced any meaningful benefit for advertisers.[111] Despite the lack of any assertion of harm from allowing co-ownership, let alone any actual record evidence of such harm, the FCC decided to retain the rule.

The FCC's action was particularly surprising given concrete economic studies in the record that demonstrated not only a lack of competitive harm from combinations, but also noted many benefits of co-ownership.[112] One study reviewed the competitive conditions in the advertising market in South Florida and concluded that co-ownership of WBZL(TV) in Miami, Florida, and the *Sun-Sentinel* in Ft. Lauderdale would not pose any competitive risks.[113] A much broader study analyzed structural indications of competition across a sample of 21 DMAs of all market sizes between 1975 and 1997.[114] In examining competition among newspapers,

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[110] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11105 (2000) ("*1998 Biennial Regulatory Review*") (citing Comments of Center for Media Education et al., MM Docket No. 98-35 (July 21, 1998), at 26-28; Comments of Independent Free Papers of America, MM Docket No. 98-35 (May 11, 1998), at 2-4 ("Comments of IFP"). *See* Comments of IFP at 3-4, 7, and 10-12.

[111] *1998 Biennial Regulatory Review* at 11108-09.

[112] *See* Section I for a discussion of the many benefits produced by today's co-ownerships.

[113] Roger D. Blair, *An Economic Analysis of the Cross-Ownership of WBZL and the Sun-Sentinel*, July 1, 1998, at 30, submitted with Comments of Tribune Company, MM Docket No. 98-35 (July 21, 1998).

[114] Economists Incorporated, *Structural and Behavior Analysis of the Newspaper-Broadcast Cross-Ownership Rules*, July 1998, submitted with Comments of the Newspaper Association of America, MM Docket No. 98-35 (July 21, 1998) ("*Economists Inc. Analysis*"). The Economists

television and radio in the sale of advertising, a market that the study acknowledged was overly narrow given the artificial exclusion of all other relevant competing media, it found that ownership concentration in twenty of the 21 DMAs it surveyed had decreased or remained unchanged since 1975 despite the frenzy of radio acquisitions following adoption of the 1996 Telecommunications Act. Based on this finding, the study concluded that elimination of the cross-ownership rules would be unlikely to result in conditions conducive to anti-competitive behavior.[115] To disprove the theoretical possibility that cross-ownership itself could impart unilateral market power in the advertising market, the study also examined the advertising prices of over 1,400 daily newspapers. The study found no reason to believe that cross-ownership is likely to lead to higher prices. After controlling for other factors, the study found that there was no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers.[116]

As a whole, the studies that were lodged in the 1998 Biennial Regulatory Review did not present any evidence that the current rule serves a useful economic purpose in any market, large or small, much less in all markets. Moreover, the studies did not provide any evidence of any economic need for any form of cross-ownership limitations in any market, large or small, much less in all markets. The record conclusively supported repeal of the rule and in no way justified retention. Consequently, these studies offer no justification for retaining the rule in total or in part in any market, large or small.

Inc. study ensured that all market sizes were represented by using data from 21 DMAs that ranked in size from DMA #3 to DMA #206. Starting with the first 10 DMAs and proceeding through DMA #211, the study broke the DMAs into groups of 10 and then selected one market from each group of 10.

[115] *Economists Inc. Analysis* at 1, 15-16.

[116] *Id.* at 1-2, 16.

B. The Lack of Definitive Empirical Market Data and The Fact-Specific Nature of the Market Definition Process Make Development of Consistent Product and Geographic Market Definitions Impossible To Achieve in the Rulemaking Context.

As the first step in finding evidence of any competitive problem warranting retention of the rule, the FCC would need to conclude that there is uniformly a relatively high degree of substitutability between newspapers and broadcast stations and that newspapers and broadcasters therefore compete in the same product market for advertising.[117] In 1975, when the newspaper/broadcast cross-ownership ban was adopted, DOJ had argued that newspapers and broadcast stations were interchangeable substitutes for each other.[118] Today, however, as the *NPRM* acknowledges, there is "considerable debate . . . on the extent to which advertising in one of these media is a substitute for advertising on another, and thus the extent to which they are in fact in the same product market."[119]

In fact, since the passage of the 1996 Telecommunications Act, DOJ has investigated dozens of media mergers, reviewed tens of thousands of pages of internal corporate documents, deposed and/or interviewed countless broadcast executives and media buyers, subjected the merging parties' contentions to rigorous economic analysis, and it consistently has concluded that the various forms of media compete in *distinct* product markets.

The experience with radio mergers illustrates the point. Beginning in 1996, the owners of merging radio properties argued to DOJ that radio was a reasonably interchangeable substitute for, and competed with, both newspapers and television for local advertising dollars; that advertising sales to radio stations accounted for only a small portion of this "market"; and that,

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[117] *NPRM* ¶ 21; *Second Report and Order*, 50 FCC Rcd at 1056.

[118] *Second Report and Order*, 50 FCC Rcd at 1056.

[119] *NPRM* ¶ 21.

accordingly, the combination of radio properties posed no antitrust concerns. DOJ subjected these claims to extensive scrutiny, using the "Second Request" procedure under the Hart-Scott-Rodino Act to obtain thousands of internal documents and obtain discovery from radio executives and media buyers.

But, in 1996, DOJ made its initial challenge to a radio merger, stating in its complaint that the relevant product market was the "provision of advertising time on radio stations in the Cincinnati metropolitan area . . . ."[120] In the accompanying Competitive Impact Statement, DOJ stated that the "merger as proposed would substantially lessen competition in the sale of *radio* advertising time in the Cincinnati area, eliminate actual competition between Jacor and Citicasters and result in increased rates for radio advertising time . . . , all in violation of Section 7 of the Clayton Act."[121]

In subsequent radio investigations, DOJ reiterated its position that advertising on radio constituted a separate and distinct product market.[122] In public statements, the Chief of the

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[120] Complaint for Injunctive Relief ¶ 19, *United States v. Jacor Communications*, 1997-1 Trade Cas. (CCH) ¶ 71,671 (D.D.C. 1996) (No. C-1-96-757).

[121] Competitive Impact Statement at 7, *Jacor Communications* (No. C-1-96-757) (emphasis added).

[122] *See, e.g.*, Complaint for Injunctive Relief ¶ 1, *United States v. Clear Channel Communications*, No. 00CV02063 (D.D.C. filed Aug. 29, 2000) (seeking to "enjoin transaction because its effect would be to lessen competition substantially in the provision of radio advertising time"); Competitive Impact Statement at 1, *United States v. Capstar Broad. Corp.*, 1999-2 Trade Cas. (CCH) ¶ 72,717 (D.D.C. 1999) (No. 99-CV-00993) (alleging that the proposed acquisition would "substantially lessen competition in the sale of radio advertising time"); Complaint for Injunctive Relief ¶¶ 20-24, *United States v. Hicks, Muse, Tate & Furst Inc.*, No. CV 98-2422 (E.D.N.Y. filed Mar. 31, 1998) (claiming that the "provision of advertising time on radio stations . . . is a relevant market . . . within the meaning of Section 7 of the Clayton Act); Complaint for Injunctive Relief at 5, *United States v. American Radio Sys. Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71,898 (D.D.C. 1997) (No. 97 CV00405) (same).

Antitrust Division emphatically *rejected* the assertion that radio and other media competed in the same product market.[123]

Likewise, DOJ has investigated transactions involving television properties and similarly concluded that there is a distinct product market for television advertising. For example, DOJ, in a recent complaint opposing the acquisition of a television station by The News Corporation, stated that broadcast television spot advertising is a relevant product market within the meaning of Section 7 of the Clayton Act. In support of its position, DOJ alleged that "[b]roadcast television spot advertising possesses unique attributes that set it apart from advertising using other types of media."[124]

Moreover, almost contemporaneously with its radio investigations, DOJ took the position and successfully persuaded a court that daily newspaper advertising was *not* reasonably interchangeable with broadcast advertising.[125] After reviewing the evidence, the district court concluded:

> As for radio and television, the main problem with such media is that the advertising message conveyed is transitory. It is nearly impossible to provide price detail, and so newspapers are especially critical for grocery stores, department stores, furniture outlets, hardware stores, car dealers, etc. Television and radio do not provide a guaranteed audience and the expense of producing

[123] Joel Klein, *DOJ Analysis of Radio Mergers*, Address at ANA Hotel, Feb. 19, 1997, 1997 WL 70922, at * 4-5; NAB Interview with Acting Assistant Attorney General Joel Klein Concerning Radio Mergers by Valerie Schulte, NAB Senior Associate General Counsel and Edward P. Henneberry of Howrey & Simon, January 1997, at 5-7.

[124] Complaint for Injunctive Relief ¶ 11, *United States v. News Corp.*, No. 01CV00771 (D.D.C. filed Apr. 11, 2001). *See also* Department of Justice Press Release, Abry Broadcast Partners Abandons Deal with Bastet Broadcasting (July 16, 1999), at http://www.usdoj.gov/atr/public/press_releases/1999/2565.htm (noting that the parties abandoned efforts to enter into an agreement to sell advertising on competing television stations after the Justice Department expressed concern over the competitive effects of the proposed deal).

[125] *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998).

> radio and television spots can be prohibitive. Many advertisers use radio and television to complement, but not replace, their use of print advertising. . . . As for circulars and direct mail, these are often considered nuisances and junk mail and are often thrown away.[126]

Similarly, the FCC has never found reason to define advertising across broadcast and newspaper outlets as a single market, and, indeed, FCC precedent recognizes and has been based upon differences in the competitive attributes inherent in different media services. For instance, in deciding in the 1998 Biennial Regulatory Review not to make any changes in the local radio ownership rules, the Commission examined competition in the broadcast industry, reviewed DOJ's current approach to defining the radio industry as a single market, and itself concluded that "for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations."[127] Shortly thereafter, in relaxing the local television ownership rules, the Commission was unable to reach any firm conclusion regarding the appropriate product market definition for television given the lack of "definitive empirical studies that quantify the extent to which various media are substitutable in local markets."[128] Nonetheless, the FCC decided to relax the local TV rules, contenting itself with recognition generally of the wide array of alternatives to broadcasting available in today's market.[129]

The Commission also has relaxed other cross-ownership rules, even in the case of media much more similar than newspapers and broadcast stations. Specifically, as discussed in Section

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[126] *Id.* at 1156.

[127] *1998 Biennial Regulatory Review* at 11088-89.

[128] *TV Ownership Report and Order*, 14 FCC Rcd at 12918.

[129] *Id.* at 12919. This decision not to reach a depositive conclusion due to a lack of empirical data reversed the FCC's earlier tentative recommendation in the *TV Ownership Further Notice* that local advertising markets be considered to include broadcast and cable television advertising, radio advertising, and newspaper advertising. *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy*

II.D.2, above, the FCC began as early as 1989 to allow television station owners to buy radio outlets, and vice-versa, when it relaxed the "one-to-a-market rule."[130] Two years ago, the Commission relaxed the rule again, permitting single television owners to own up to seven radio stations in a market and duopoly television owners to own up to six.[131] One cannot seriously maintain that newspapers and television properties are so "reasonably interchangeable" as to justify a prohibition on cross-ownership, but find no similar interchangeability between television and radio properties.

The lack of definitive empirical data that the FCC has received to date, despite its repeated pleas for information, requires that the FCC not adopt in a rulemaking context any particular definition at odds with those asserted by DOJ after extensive investigation and based on an evidentiary record.[132] Wholesale grouping of newspaper and broadcast properties together into a single advertising product market may ignore important marketplace realities. Radio can offer local advertisers much more concise targeting of particular demographic groups than newspapers generally can provide. Television may not offer as much precision as radio in reaching desired local audiences, but still certainly more than newspapers generally can supply. Newspapers, on the other hand, allow local advertisers to reach a greater number of consumers. At the same time, newspapers offer classified advertising, a product that broadcast stations have never seriously attempted to provide.

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and Rules, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, 3543 (1995) ("*TV Ownership Further Notice*").

[130] *1989 One-to-a-Market Order*, 4 FCC Rcd at 1741.

[131] *TV Ownership Report and Order*, 14 FCC Rcd at 12908.

[132] Such a problem argues for leaving any regulation of antitrust abuses, if they arise, to the federal antitrust agencies to handle on a case-by-case basis. *See* Section III.C., below.

Moreover, even if these differences were overlooked and newspaper and broadcast stations were grouped in the same product market, that market now would have to include, as the FCC intimated in the *TV Ownership Proceeding*, numerous other players -- cable systems, wireless cable providers, other newspapers and magazines, Yellow Pages, billboards, and, most recently, Internet websites.[133] The Commission must acknowledge this extensive growth in alternative suppliers in making changes to its rules, even if this vigorous competition cannot be measured precisely. Accordingly, given the varying characteristics of today's media market, accurate and uniform product market definitions are probably impossible.

Even if an appropriate product market definition could be crafted, defining a suitable geographic market that could be applied consistently in all markets nationwide would be virtually impossible. Media services typically reach widely differing geographic areas. Television stations, in particular, reach not only the areas covered by their licensed contours but frequently find their reach extended by retransmission by Class A and low power television stations, television translators, cable television systems, and DBS services. A radio station's licensed service area can also be expanded by FM translators and retransmission by cable systems. While newspapers may have more readily measured areas of circulation, these data are reported to the Audit Bureau of Circulation in various geographic components, whereas radio station ratings are determined by Arbitron based on certain geographic principles, and television share data are calculated by Nielsen Media Research based on an entirely different geographic system. While the Commission's desire to address competitive issues related to all newspaper/broadcast combinations in a rulemaking proceeding with the precision achievable in a particular antitrust case is laudable, designing consistent definitions that anticipate a myriad of

[133] *TV Ownership Report and Order*, 14 FCC Rcd at 12918.

local market situations is simply not possible. Without such definitions and without any evidence of harm, the newspaper/broadcast rule must be repealed.

C. If a Competitive Problem Were Ever To Develop, the Federal Antitrust Agencies as Well as State Antitrust Authorities Have the Expertise, Procedures and Willingness To Address the Problem.

In this country, authority for protecting businesses and consumers from competitive abuses that arise in interstate commerce lies principally with the federal antitrust agencies, the Department of Justice's Antitrust Division and the Federal Trade Commission, and (with respect to abuses at the state level) the state attorneys general. DOJ and FTC both have authority to oversee media mergers through their enforcement powers under Section 7 of the Clayton Act,[134] and the two agencies have worked closely together over the years to develop a coordinated clearance process to avoid duplication and ensure that the same transaction is appropriately assigned to one or the other of them.[135] While the Hart-Scott-Rodino Act sets minimum thresholds for the affirmative reporting of transactions to DOJ and FTC,[136] both agencies have general Clayton Act authority to prevent acquisitions or other transactions that may result in a substantial lessening of competition, no matter what the size of the transaction and no matter how small the market it involves.

The protection that arises from these enforcement powers is more than adequate to guard against any isolated dangers to competition in particular advertising markets that theoretically might arise as a result of repeal of the newspaper/broadcasting cross-ownership ban. There are at

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[134] 15 U.S.C. § 18.

[135] Section of Antitrust Law, American Bar Association, *The Merger Review Process*, 125-26 (1995).

[136] 15 U.S.C. § 18a(a).

least four reasons why antitrust enforcement should be entrusted to the Justice Department and the FTC, rather than to the crude and blunt instrument that the cross-ownership rule represents.

First, today, the antitrust enforcement agencies' review of mergers is far more sophisticated than it was in 1975, when the cross-ownership ban was adopted. In 1982, DOJ significantly revised its merger guidelines, and it revised them again in 1984.[137] In 1992, DOJ and the FTC issued new joint guidelines covering the analysis of horizontal mergers, and in 1997 they revised those guidelines to address further consideration of efficiencies in merger analysis.[138] Together, these changes have brought a doctrinal and more policy-based consistency to merger analysis.[139] Application of these more sophisticated and economically precise standards assures higher levels of protection against competitive abuses and has led to a more predictable body of case law. These more consistent substantive and procedural standards assure that DOJ and FTC antitrust review of any competitive harms that may arise from repeal of the newspaper-broadcast cross-ownership ban will be sufficient to protect advertisers.

Second, certain provisions and the legislative history of the 1996 Telecommunications Act support the view that Congress intends that DOJ and the FTC (and not the FCC) perform antitrust analyses of proposed media combinations in the first instance. The 1996 Telecommunications Act was deregulatory in its approach and, at its core, sought to foster

[137] 1984 Merger Guidelines, Department of Justice, Antitrust Division, 49 Fed. Reg. 26823 (June 29, 1984) ("Notice"); Merger Guidelines, Department of Justice, Antitrust Division, 47 Fed. Reg. 28493 (June 30, 1982). DOJ first began using less extensive and sophisticated guidelines in 1968. *See generally* Steven A. Newborn & Virginia L. Snider, *The Growing Judicial Acceptance of the Merger Guidelines*, 60 Antitrust L.J. 849 (1991/1992) ("Newborn & Snider").

[138] 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992): United States Dep't. of Justice and the Federal Trade Comm'n, Revision to Horizontal Merger Guidelines (Apr. 8, 1997).

[139] Newborn & Snider, 60 Antitrust L.J. at 849.

competition across all media and telecommunications industries.[140] The Act, moreover, specifically included an antitrust savings clause, which states that the Act does not "modify, impair or supercede the applicability of any of the antitrust laws."[141] Representative Conyers described the antitrust savings clause as "all-important" since it ensures that "any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. Telco-cable mergers and all other broadcast, media, or telecommunications transactions will be fully subject to antitrust review, regardless of how they are treated under the bill or the FCC."[142] Even President Clinton commented on the clause in signing the 1996 Act: "This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully."[143]

Third, since assuming office earlier this year, Chairman Powell has observed that he would like to see the FCC do less competition analysis, stating that such work is better left to the

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[140] The Act sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Telecommunications Competition and Deregulation Act of 1995, Pub. L. No. 104-104, S. Rep. No. 104-23 (Mar. 30, 1995), 1995 WL 142161, at *1.

[141] Section 601(b)(1) of the Telecommunications Act of 1996, *reprinted* in 47 U.S.C.A. § 152, Historical and Statutory Notes.

[142] 142 Cong. Rec. H1171 (1996) (statement of Rep. Conyers). He also noted:

> [T]he antitrust laws and the Antitrust Division must remain at the very center of the telecommunications debate. Antitrust law is synonymous with low prices and consumer protection -- and that is exactly what we need in our telecommunications industry. The Antitrust Division is the principal government agency responsible for antitrust enforcement. Its role in the MFJ has given it decades of expertise in telecommunications competition issues. The Division has unrivaled expertise in making predictive judgements and in assessing marketplace effects. The FCC by contrast has no antitrust background, and is facing the threat of significant downsizing.

Id.

antitrust agencies.[144] While still a Commissioner, the Chairman also had noted that the FCC lacks the antitrust expertise necessary to mirror the sophisticated merger reviews conducted by the federal antitrust agencies.[145] Moreover, this arguably can be said to have been the FCC's position since at least the 1940's.[146]

Fourth, perpetuating a flat regulatory ban on newspaper/broadcast cross-ownership is a crude and overly blunt form of antitrust enforcement. It in fact has prohibited transactions that have not posed any antitrust problems whatsoever, in both large and small markets. In the last decade, DOJ has approved various newspaper/broadcast combinations for which the FCC then subsequently granted only temporary waivers of its archaic newspaper/broadcast cross-ownership ban, certainly implying that the FCC flat ban is unnecessary to protect competition.[147] Retaining such a rule leaves some assets in the hands of those who are not their highest value owners, in both large and small markets. It also prohibits owners from deriving any of the benefits and competitive efficiencies that accompany mergers, such as combined administrative staffs or combined advertising staffs, whether they be in small or large markets.

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[143] President's Statement on Signing of the Telecommunications Act of 1996, 1996 Pub. Papers Vol. 1, at 189 (Feb. 8, 1996).

[144] *FCC Chairman Leery of Antitrust Duties*, Chicago Tribune, Mar. 29, 2001, at 2, available at 2001 WL 4056462.

[145] Opening Statement of Michael K. Powell, FCC Commissioner, Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, March 17, 1999, *available at* 1999 WL 187673, at *6.

[146] *See NBC. v. United States,* 319 U.S. 190, 223-24 (1943) (quoting 1941 FCC Report on Chain Broadcasting that it is not FCC's function to apply the antitrust laws to questionable network practices); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 350 n.18 (1959).

[147] *See, e.g.*, UTV of San Francisco, Inc., *Memorandum Opinion & Order*, FCC 01-209, 2001 FCC LEXIS 4022 (rel. July 25, 2001); Capital Cities/ABC, Inc., *Memorandum Opinion & Order*, 11 FCC Rcd 5841 (1996).

Without reform, paradoxes and anomalies will continue to exist. It will be easier for a broadcaster to acquire another broadcast station than to purchase a newspaper, even a daily newspaper with little circulation and no advertising revenue. Newspapers will continue to be prohibited from purchasing small failing broadcast stations, whereas other stations in the market may buy them, if necessary obtaining a "failing station" waiver if the acquisition would otherwise result in a violation of the broadcast multiple ownership rules. Similarly, a broadcaster is prohibited from acquiring a failed newspaper, but another newspaper or ad agency is not. In short, all broadcasters and newspapers are denied the right to enter into transactions with what may be the only possible and available purchaser for their properties. Given the lack of any demonstrated harm from repeal of the newspaper/broadcast cross-ownership ban, the FCC should act quickly to eliminate it so that these anomalies may be removed and the competitive benefits and synergies of combinations may be allowed to emerge.

D. Any Concern Over Competitive Harm Is Assuaged by the Operational Synergies and Other Benefits Derived from Convergence.

The FCC's speculative concern over competitive harms engendered by common ownership of newspaper and broadcast stations is best rebutted by the economic study of advertising rates submitted in the 1998 Biennial Regulatory Review, which found no statistically significant difference between the advertising rates of newspapers commonly owned with broadcast stations and those of other papers.[148] Even if these concrete results are ignored and a potential harm posited, the Commission can still find sufficient operational synergies and resulting benefits to outweigh any isolated economic harms that it may anticipate.

As experts have acknowledged, common ownership produces both organizational and "associational" benefits that result in more efficient development of news and other informational content.[149] The gains from these operational synergies can then be reinvested, as has been the case in Media General's experience, in enhanced and expanded informational content, allowing an overall boost to the public interest.

The public interest benefits derived from common ownership are so apparent and extensive that they outweigh any assumption of economic harm.[150] They include not only the qualitative improvement of news content that arises from day-to-day sharing of news budgets, "scoops," archives, polling materials, and other tools directly related to news production, but also the generation of broader community and societal benefits. For example, without common ownership, residents of the Florence, South Carolina DMA would not receive prompt coverage of developments in Myrtle Beach or direct reports on the political discourse in their state capital of Columbia. With common ownership, the residents of the Columbus, Georgia DMA -- whether located in Columbus itself or thirty miles away in Auburn and Opelika, Alabama -- are receiving expanded news coverage of events throughout the whole region and an increased sense of regional identity and cohesion that transcends state lines. With common ownership in the Tri-Cities, Tennessee/Virginia DMA, there have been similar increases in social and civic ties among politically separate communities.

In sum, common ownership produces myriad public benefits, some more measurable than others. Together, they dispel any concern over anti-competitive harms, which to date have never advanced beyond speculation or conjecture.

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[148] Section III.A. above.

[149] Section I.E. above.

[150] *See 1989 One-to-a-Market Order* at 1751.

IV. The 1996 Telecommunications Act Sets a High Standard of Proof for Retention of the Newspaper/Broadcast Cross-Ownership Ban and Places That Burden Squarely on the Commission.

Section 202(h) of the Telecommunications Act of 1996 requires the FCC to evaluate market conditions every two years and determine whether any of its ownership rules remain "necessary in the public interest as the result of competition."[151] The FCC must "repeal or modify any regulation" that is not in the public interest.[152] By its terms, this provision imposes substantive criteria against which the FCC must justify its rules ("necessary in the public interest as the result of competition"), a required remedy ("modify or repeal"), and an explicit statutory deadline for action ("biennially").

The legislative history of the 1996 Telecommunications Act explains why Congress decided to impose this new mandate and deadline. Specifically, Congress concluded that, because of "the explosion of video distribution technologies and subscription-based programming sources . . . Congress and the [FCC] must reform Federal policy and the current regulatory framework to reflect [ ] new marketplace realities."[153] In Congress' view, the industry is now "operating under archaic rules that better suited the 1950's than the 1990's," even though "the broadcast environment today is the most competitive it's ever been."[154]

The FCC has now completed a first biennial review, plus a cursory second biennial review, in which the Commission decided tentatively to retain the newspaper/broadcast cross-ownership ban and to initiate this rulemaking. This rulemaking proceeding is clearly an

[151] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996).

[152] *Id.*

[153] H.R. Rep. No. 104-204, at 55 (1995).

[154] S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns). Senator Burns explicitly included the newspaper/broadcast cross-ownership ban as among the rules he felt needed

outgrowth of the biennial review proceedings, and the FCC is required in justifying its conclusions in this proceeding to comply with the mandate of Section 202(h). The mandate of Section 202(h) is equally clear: the FCC must repeal or modify the regulation unless it is affirmatively shown to be necessary to protect competition.[155]

Section 202(h) squarely places on the proponents of continued regulation the burden of persuasion for justifying retention of the rule. Commissioners charged with the biennial review obligation have repeatedly recognized that Congress intended the basic goal of the reviews to be repeal of rules that could no longer be justified as servicing the public interest. As the current Chairman stated and other Commissioners have echoed, "the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity . . . . I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity."[156] Similarly, former Commissioner Harold Furchtgott-Roth explained that "[u]nder Section 202(h), the Commission's job is to explain why changes in competition have not rendered broadcast ownership rules superfluous in promoting the public interest."[157] Thus, unless the FCC can make a probative showing on the record that the newspaper/broadcast cross-ownership ban is necessary to protect competition, the ban cannot be retained.

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reevaluation because they "may not be appropriate for tomorrow's broadcasting marketplace." *Id.*

[155] *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall," "Congress could not have chosen [a] stronger word[ ] to express its intent that [action] be mandatory in cases where the statute applied").

[156] *1998 Biennial Regulatory Review*, 15 FCC Rcd at 11151 (Statement of Commissioner Powell).

[157] *Id.* at 11132 (Dissenting Statement of Commissioner Furchtgott-Roth).

As shown above in Section III, the FCC cannot make a showing that competitive considerations require retention of the rule. Indeed, marketplace developments since adoption of the ban have created extensive competition in all aspects of the services that broadcasters and newspapers render. Provision of news, information, and other content is no longer their exclusive province. Such content is now offered by numerous services that did not even exist a quarter century ago. Similarly, advertisers can find increased platforms for their messages not only with the greater number of traditional media outlets that exist today but also with numerous new service providers that did not exist when the newspaper/broadcast cross-ownership ban was adopted. As also shown above, any concern over prospective competitive abuses, were they to develop, can be met through review by federal and state antitrust agencies. The Commission cannot meet the statutorily imposed burden of demonstrating under Section 202(h) that the archaic newspaper/broadcast cross-ownership ban remains necessary for the public interest as it relates to competition, and the rule must be repealed.

V. Fundamental Principles of Administrative Law Require Repeal of the Cross-Ownership Ban.

The Supreme Court has held that, in reviewing regulations of the broadcast media, courts must recognize that the "industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[158] This statement captures the anachronistic essence of the newspaper/broadcast cross-ownership rule.

As explained above in Section II, technological advances and the explosion of new media outlets in the marketplace already have provided the conjectural "hoped for" gain in diversity that the 1975 cross-ownership ban was designed to foster. In light of these changes and equally fundamental changes in the Commission's other broadcast structural ownership regulations, no rational basis remains for the Commission to continue to preclude newspaper publishers from owning any broadcast stations in their home markets.

As the United States Court of Appeals for the District of Columbia Circuit has noted, the Commission's newspaper/broadcast cross-ownership rule is not predicated on substantial evidence, but on only the agency's predictive "judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination.'" [159] The Court of Appeals subsequently explained that:

> The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise, *see FCC v. National Citizens Comm for Broadcasting*, 436 U.S. 775, 814 (1978), implies a correlative duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would.[160]

The *Bechtel* Court specifically ruled that "[i]n the rulemaking context . . . it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'"[161] Pursuant to this principle, the Commission must reexamine and repeal its newspaper/broadcast cross-ownership ban because changes in the media marketplace and concrete evidence compiled in biennial review and other ownership proceedings

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[158] *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

[159] *NCCB*, 555 F.2d at 962.

[160] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

[161] *Id.* (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)). In *Bechtel,* the D.C. Circuit ordered the FCC to reconsider and explain whether its policy favoring "integration" of ownership and management in comparative hearings was still in the public interest in light of other regulatory changes implemented since the Commission adopted its integration policy. Likewise, in 1995, the United States Court of Appeals for the Sixth Circuit required the Commission to reconsider its structural separation rules for cellular service because it determined

have undermined the factual assumptions underlying the policy it adopted in 1975. *Bechtel* teaches that the Commission can no longer rely on purely speculative assumptions made more than a quarter century ago when, since that time, it has compiled a voluminous evidentiary record demonstrating that the newspaper/broadcast cross-ownership rule is not necessary to create diversity and does not serve the public interest. Instead, the Commission has an affirmative obligation to modify its predictive judgment in light of a fresh evidentiary record.[162] The Commission must both "'examine[] the relevant data'" available to it now and "'articulate[] a satisfactory explanation'" for any decision to retain its restriction.[163] If the Commission "fail[s] to provide a reasoned explanation," or if the new "record belies the agency's conclusion," a reviewing court "must undo its action."[164]

Consistent with these authorities, the Commission must repeal its newspaper/broadcast cross-ownership rule because the record available to it today plainly belies the scarcity and diversity rationales upon which it predicated its policy choices in 1975. As the NAA noted in its 1999 Emergency Petition for Relief,[165] the extensive evidentiary submissions that the Commission received in its 1998 Biennial Review Proceeding alone conclusively establish that:

- The marketplace for news, information, and entertainment is vastly more diverse and competitive than in 1975, eviscerating the scarcity rationale previously employed to justify intrusive governmental oversight of broadcasting, and eliminating any legitimate concerns with respect to diversity;[166]

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that the "factual predicate which justified the structural separation requirement is no longer valid." *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995).

[162] *Bechtel*, 957 F.2d at 881.

[163] *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citation omitted).

[164] *Id.*

[165] *See* Emergency Petition for Relief at 15-16.

[166] *See* Comments to the Notice of Inquiry by the Association of Television Stations, Inc., MM Docket No. 98-15, at 31-34 (filed July 21, 1998); Joint Comments of Cox Broadcasting, Inc. &

- Commonly owned newspapers and broadcast stations typically maintain separate news and editorial staffs, enjoy operational independence, and compete vigorously with each other, as well as with the extensive array of independently owned media outlets in the local marketplace;[167] and

- Co-owners tend to provide more and better local news and public affairs programming and often create "value added" services and new information products that would, in the absence of joint ownership, be too expensive to provide.[168]

In numerous proceedings conducted since 1975 -- including many proceedings eliminating or relaxing other multiple ownership restrictions -- the Commission itself has cast serious doubt on the assumptions underlying its archaic newspaper/broadcast cross-ownership ban, and it has acknowledged that common ownership of media outlets fosters diversity in content and enhances programming in the public interest.[169] Based on the Commission's own

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Media General, Inc., MM Docket No. 98-35, at 6-12 (filed July 21, 1998); Comments of Gannett Co., Inc., MM Docket No. 98-35, at 12-16 (filed July 21, 1998) (describing the substantial growth in broadcasting industry since 1975); Comments of The Hearst Corp., MM Docket No. 98-35, at 10-15 (filed July 21, 1998); Comments of The National Association of Broadcasting, MM Docket No. 98-35, at 4-9 & App. A (filed July 21, 1998); Comments of NAA, MM Docket No. 98-35, at 31-35 (filed July 21, 1998); Comments of Tribune Co., MM Docket No. 98-35, at 22-51 (filed July 21, 1998).

[167] *See* Comments of A.H. Belo Corporation, MM Docket No. 98-35, at 20-22 (filed July 21, 1998); Comments of The Chronicle Publishing Co., MM Docket No. 98-35, at 16-21 (filed July 21, 1998); Comments of Gannett Co., Inc., MM Docket No. 98-35, App. A (filed July 21, 1998); Comments of Lee Enterprises, Inc., MM Docket No. 98-35, at 4 (filed July 21, 1998); Comments of National Association of Broadcasters, MM Docket No. 98-35, at 8-11 & App. B (filed July 21, 1998); Comments of NAA, MM Docket No. 98-35, at 60-65 (filed July 21, 1998); Comments of Tribune Co., MM Docket No. 98-35, at 59-72 (filed July 21, 1998).

[168] *See* Comments of A.H. Belo Corporation, MM Docket No. 98-35, at 15-20 (filed July 21, 1998); Comments of The Chronicle Publishing Co., MM Docket No. 98-35, at 16-25 & Ex. B (filed July 21, 1998); Comments of Gannett Co., Inc., MM Docket No. 98-35, at 27-32 & App. B (filed July 21, 1998); Comments of The Hearst Corp., MM Docket No. 98-35, at 15-16 (filed July 21, 1998); Comments of NAA, MM Docket No. 98-35, at 60-65 (filed July 21, 1998); Comments of Tribune Co., MM Docket No. 98-35, at 59-72 (filed July 21, 1998).

[169] *See, e.g.*, *Revision of Radio Rules and Policies*, *Notice of Proposed Rulemaking*, 6 FCC Rcd 3275, 3276 (1991) ("[w]e believe that increased group ownership need not necessarily decrease diversity of programming and, to the contrary, may encourage it . . . ."); *Dual Network Rule Order*, 16 FCC Rcd at 11131 ("We also agree with commenters that a major network and an

conclusions, the detailed evidence discussed above in Section II, and voluminous evidence submitted in prior biennial review proceedings, the agency must acknowledge that changed circumstances have eroded the primary factual underpinnings for the *Second Report and Order*.

The Commission also must recognize that the continued enforcement of the newspaper/broadcast cross-ownership ban cannot be reconciled with its decisions in other contemporary media multiple-ownership and cross-ownership proceedings. It is axiomatic that an "agency must offer clear, cogent explanations for treating [similarly situated] parties differently."[170] The Commission arguably complied with this principle in 1975 when all broadcast owners generally were limited to controlling a single outlet in a community. Today, however, multiple ownership of same-service outlets and common ownership of television and radio outlets are allowed routinely, and newspapers and broadcast station owners stand virtually alone in confronting an absolute regulatory barrier to common ownership. There are numerous examples of such changes.

In 1975, for example, radio ownership was limited to only a single AM and a single FM station in the same market.[171] Now, "depending on the number of voices in a market, as many

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emerging network under common ownership would have a strong economic incentive to diversify their program offerings, particularly by increasing service to minority or niche tastes and interests."); *Revision of Radio Rules and* Policies, Memorandum *Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387, 6389 (1992) ("[T]he Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming."); *Review of the Prime Time Access Rule*, 11 FCC Rcd 546, 556 (1995) (Given the proliferation of media outlets, repeal of PTAR would "not jeopardize the competition and diversity goals that prompted the Commission to adopt the rule in 1970.").

[170] *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 886 (D.C. Cir. 1999).

[171] 47 C.F.R. §§ 73.35 and 73.240 (1976).

as eight radio stations . . . may be commonly owned."[172] In August 1999, as discussed in Section II above, the Commission also loosened its television duopoly rule to permit broadcasters to own two television stations in markets where there are a sufficient number of other, independently owned stations.[173] At the same time, the Commission relaxed its one-to-a-market rule to permit broadcasters to own two television stations in the same markets in which they also own multiple radio stations.[174] The Commission has expressly declined to adopt a cable/newspaper cross-ownership restriction,[175] and, as discussed in Section III above, no other non-broadcast media owners are prohibited from owning a daily newspaper.

Just as an "agency must provide adequate explanation before it treats similarly situated parties differently, so too must it "justify its failure to take account of circumstances that appear to warrant different treatment for different parties."[176] Any decision by the Commission in this proceeding to maintain any vestige of its current ban on newspaper/broadcast cross-ownership would violate both requirements. There could be no rational explanation for continuing to prohibit newspaper publishers from acquiring interests in even a single broadcast outlet when existing owners of broadcast facilities can combine two radio stations and up to six radio

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[172] *Newspaper Radio/Cross Ownership Waiver Policy, Notice of Inquiry*, 11 FCC Rcd 13003, 13009 (1996).

[173] *TV Ownership Report and Order*, 14 FCC Rcd at 12932-33.

[174] *Id.* at 12947.

[175] Amendment of Part 76 of the Commission's Rules and Regulations Relative to Diversification of Control of Community Antenna Television Systems; and Inquiry with Respect Thereto to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, *First Report*, 52 FCC 2d 170, 171 (1975).

[176] *Petroleum Communication*, 22 F.3d at 1172.

stations, and when other media that the Commission has acknowledged compete in the "same diversity market"[177] face no ownership restrictions.

Nor could the Commission justify maintaining its current prohibition in light of the significant *differences* the agency identified between newspapers and television stations in terms of their comparative influence on diversity. Specifically, in its *Television Ownership Report and Order*, the Commission stated that "broadcast television *more so than any other media,* continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[178] In the same order, the Commission adopted an "eight remaining voices" test that counts *only* television voices -- and gives absolutely no weight to daily newspapers -- for purposes of determining an acceptable baseline of local media diversity.[179] As discussed above in Section III, having concluded that the presence of an independently-owned daily newspaper is insignificant for purposes of measuring the effects of television ownership on diversity, the Commission cannot dispute the correlative proposition that the affiliation of a newspaper with a television station is equally insignificant to local diversity.

VI. The Rule Violates the First Amendment and Equal Protection Clause and Must Be Repealed.

A. Spectrum Scarcity No Longer Exists and Cannot Serve as the Basis for a Diminished Standard of First Amendment Protection for Broadcast Licensees.

Although the archaic newspaper/broadcast cross-ownership rule unquestionably implicates First Amendment rights, the Supreme Court declined to apply traditional standards of

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[177] *TV Ownership Report and Order*, 14 FCC Rcd at 12953.

[178] *Id.* at 12934 (emphasis added).

[179] *Id.* at 12915-16, 12934.